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The Commercial Law of Nations and the Law of International Trade

IMRE GAL*

It is widely thought that the political pattern of the world has ceased to reflect its multifaceted needs. Concern for economic development has assumed new importance as the gap between rich and poor nations has widened. Statesmen, scholars, and community leaders increasingly recognize that "[t]he threat to peace is not in ideological divisions but in hunger"¹ and overpopulation, and that the industrialized countries must be prepared to make temporary sacrifices to solve it.²

This historical shift in emphasis from security to socioeconomic concerns has had a profound effect on the structure of international relations and, consequently, on the development of international law.

With the increasing participation of States and other international persons in far-reaching agreements promoting international development programs, regulation of resulting international trade has, over the years, assumed two distinct forms: the first is under the general ambit of public international law, that is, the "Commercial Law of Nations"; the second is under the norms of private international law, the "Law of International Trade." Writers and international lawyers have often confused the two concepts and used them indiscriminately and interchangeably.

The Commercial Law of Nations deals fundamentally with the trade relationships between sovereign States and other international persons, even if they also include dealings with private business corporations. The

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1. *PATH TO WORLD ORDER* xix (A. W. Cordier & K. L. Maxwell eds. 1967).

2. Blough, *The Furtherance of Economic Development*, 19 INT'L ORGANIZATION 562, 577 (1965).

Law of International Trade deals with trade relationships outside the purview of sovereign States, involving exclusively private individuals and corporations. The distinction between public and private international law, however, is not always clear. Modern social and economic developments have had their influence on the two branches of law, blurring and blending them.

This raises the serious problem of how to create an ordered system of international trade law that will distinguish private from public international law. The purpose of this article is to attempt to define the distinct character and nature of these two legal systems by analyzing their scope and sources.

I

THE COMMERCIAL LAW OF NATIONS

A. ITS SCOPE AND DEVELOPMENT

As States become more active in areas once considered the domain of private business interests, an increasing proportion of international commercial transactions become the necessary concern of public international law. These transactions fall into three major categories:

- (1) Commercial transactions between States or between States and international organizations;
- (2) Financial transactions of international agencies; and,
- (3) Transactions to which a government or a governmental organization and a private business corporation are parties, for example, a straight commercial sale or an agreement relating to the exploitation of natural resources or the development of government-owned public utilities, often in partnership with the government.

The first two categories of transactions are generally recognized as being within the purview of the Commercial Law of Nations. However, the third category raises the problem of whether public international law can be applied to transactions involving private parties. Jessup³ and Mann⁴ are of the opinion that agreements involving private parties on one side may be subject to public international law. Wolff⁵ and Fawcett⁶

3. P. C. JESSUP, *A MODERN LAW OF NATIONS* 139 *et seq.* (1948).

4. Mann, *The Law Governing State Contracts*, 21 BRIT. Y.B. INT'L L. 34 (1944).

5. M. WOLFF, *PRIVATE INTERNATIONAL LAW* 417 (2d ed. 1950).

6. Fawcett, *Legal Aspects of State Trading*, 25 BRIT. Y.B. INT'L L. 34 (1948).

argue, however, that public international law applies exclusively to agreements between States. More recently, Lord McNair has supported the latter position.⁷ Compounding the problem has been the rise of the public (or government) corporation, arguably either a public or private entity, one of the most significant institutional legal developments of our age.

Even assuming that private parties can be subject to public international law, the question of the source of the law to be applied to commercial transactions between States and private parties remains. It was analyzed by Lord Asquith of Bishopstone in his award in the *Abu Dhabi* case.⁸ He concluded that international law was the only law properly applicable to the agreement:

What is the "Proper Law" applicable in construing this contract? This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal law of England would apply. On the contrary, Clause 17 of the agreement, cited above, repels the notion that the municipal law of any country, as such could be appropriate. The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of "modern law of nature."⁹

The great majority of the scholars in the socialist countries reject Lord Asquith's notion that commercial transactions between States or public international organizations and private corporations or persons should be governed by the rules of traditional international law. They reason that recognition of this notion would put private corporations and persons on an equal legal footing with States, which is—according to them—unacceptable.

There are thus a growing number of international commercial transactions which arguably cannot be regulated by either existing public international law or the rule of private commercial law. As Professor Mann states, "We are witnessing the growth of activities which occur in what to a considerable extent is a legal vacuum and for which the law remains to be found."¹⁰

7. McNair, *The General Principles of Law Recognized by Civilized Nations*, 31 BRIT. Y. B. INT'L L. 1, 10 (1957).

8. *Petroleum Development, Ltd. v. Sheikh of Abu Dhabi*, [1951] I.L.R. 144 (No. 37).

9. *Id.* at 149.

10. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT'L L. 20 (1957).

Since States, at the present stage of international relations, will not subject themselves to the municipal law of another sovereign, the Commercial Law of Nations *should develop as a synthesis of public and private international law*. It should be adjusted to the purposes and needs of international commercial life, which, arising under the impact of political and economic considerations, are conditioned by the demand of international merchants for flexibility and simplicity in achieving quick solutions. It should reconcile the prerogatives of sovereignty with the interests of private enterprises by establishing a fair balance between them.

One approach to furthering this development has been put forward by Mann. He suggests that basic principles of commercial law, like general principles of law recognized by civilized nations, be identified and defined by comparative law.¹¹ Other writers endorse the idea. Friedmann states, "Such general principles will have to be discovered from a comparative study of the major principles of commercial contracts prevailing among the major legal systems of the world."¹² However, even if such principles of commercial law are discoverable, the question remains whether they can be equated with legal rules capable of governing particular commercial transactions. Some, including Ripert¹³ and Verdross,¹⁴ maintain that the technical character of a legal rule makes it impossible to be identified with a general principle. However, Mann argues that, even if the technical character of legal rules prevents identity with general principles,¹⁵ the distinction between the two has never been satisfactorily defined and should be discarded.¹⁶

International practice does not favor any distinction. Distinguishing between principles and rules in this area ignores the requirements of the Commercial Law of Nations. Dr. Mann comments,

It is of the very essence of commercial law that it is frequently concerned with technicalities of the law. The commercial law of nations would be poorly served and could, indeed, not be developed at all if it could not be built upon generally recognized rules of a technical character, but had to

11. *Id.* at 36.

12. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 171 (1964).

13. Ripert, *Les Règles du Droit Civil Applicables aux Rapports Internationaux*, 44 *RECUEIL DES COURS* 569, 582-83 (1933).

14. Verdross, *Les Principes Generaux du Droit dans la Jurisprudence Internationale*, 52 *RECUEIL DES COURS* 195, 205 (1935).

15. Mann, *supra* note 10, at 36.

16. *Id.*

rely on principles or maxims which are necessarily vague, colourless, and ambiguous.¹⁷

Regardless of the method to be used to discover the general principles forming the core of the Commercial Law of Nations, the question becomes one of the sources to be consulted in advancing the search. Generally, the primary sources of law are the statutes as interpreted by the courts. Other sources may be historical and persuasive in nature, but often account only for the existence of a rule of law at a given time and place.¹⁸

Public international law, by its very nature, does not have the "statute" to give it validity, but it has other sources, including custom, international conventions and the decisions of international tribunals, all of which have attributes of formality and legality.

B. THE SOURCES OF THE COMMERCIAL LAW OF NATIONS

1. Custom

International custom has been defined as a "clear and continuous habit of doing certain actions [that] has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right."¹⁹ Until recently, it was the principle source of international law. It found its antecedents in state practices.

International commercial customs differ somewhat from other international customs in their origins and character but nonetheless play an important role in determining the Commercial Law of Nations. They emerged from the commercial practice as discussed and analyzed in the courts of England. Their central theme is that merchants have an interest in a solution that is fair to all concerned and, therefore, commercial law ought to be a reflection of the practices in which merchants generally engage.²⁰

In earlier times, when trade transactions were handled in the market place, and the parties to the contract met face to face, the existence of a trade custom was not difficult to prove. Now, with the scope of trading

17. *Id.* at 38.

18. J. SALMOND, *TREATISE ON JURISPRUDENCE* §§ 38-41 (11th ed. 1957); H. L. A. HART, *THE CONCEPT OF LAW* 246 (1961).

19. I. L. OPPENHEIM, *INTERNATIONAL LAW* 26 (8th ed. Lauterpacht 1955).

20. See Address by P. Devlin, London School of Economics and Political Science, May 1, 1951, in 14 *MODERN L. REV.* 249-51 (1951).

activities greatly enlarged, and with the written form having superseded the face-to-face meeting, a trade custom will not be recognized by the court unless "it can be shown to be reasonable, to be consistent with the express terms of the contract, and to be universally recognized as a binding trading custom."²¹ Thus, the regulation of the intricate and complex matters of today's international commerce is generally accomplished more by instruments that are articulate and specific than by custom.²²

However, while inadequate as a major source of modern international commercial law, custom is still an important factor in the evaluation and modification of the principles of classical international commercial law, especially in connection "with the subsequent articulation of rules by international treaties, and in this capacity custom is a preliminary phase of international law-making by treaty."²³ It may also be called upon to supplement written documents governing commercial transactions.

2. *International Agreements*

International treaties and other written agreements are increasingly replacing custom as the principle source of international commercial law. In the absence of other forms of international legislation, these documents have become articulate instruments of law making, regulating economic, social, cultural, and administrative matters.

For example, several international organizations, including the International Bank for Reconstruction and Development, the International Monetary Fund, and the European Investment Bank, have recently concluded financial transactions with States, other international organizations, and private foreign parties backed by government guarantees. Although these types of agreements cannot be considered international treaties since they have been concluded without the formal requirements and procedures necessary for treaties, the fact that such international agreements do affect international relations elevates them to a position where it would be justified to consider them as a source of public international law and the Commercial Law of Nations.

3. *Decisions of International Tribunals*

In a municipal system the courts interpret, mold and develop the law in response to new social needs.²⁴ International commercial arbitration

21. *Id.* at 251.

22. W. FRIEDMANN, *supra* note 12, at 122.

23. *Id.* at 123.

24. *Id.* at 117.

tribunals have yet to become instrumental in the development of international commercial law; that law, still in its early stages of development, has hardly been considered by those international tribunals.²⁵ Nevertheless, the growing tendency to constitute arbitration tribunals as a part of international concession agreements has in it the promise of contributing to the development of this new body of law.

The need for an acceptable method of settling disputes arising out of international commercial transactions has always been great. Businessmen usually prefer to settle by arbitration. The frequency of such arbitrations has been increasing "due primarily to the fact that foreign parties are seldom willing to submit to the determination of courts of the very country which is a party to the contract."²⁶ However, relatively little is known about such arbitrations as reports of the arbitral awards have not been published.

C. THE SPECIAL CASE OF THE PUBLIC CORPORATION

As earlier noted, the rise of the public (or government) corporation has been among the most important institutional legal developments of recent times. As a relatively new and unique entity increasingly involved in international commercial transactions, its status before the law is worthy of special consideration.

Government corporations are not readily classifiable as either public or private, adding a difficult threshold question to the determination of whether their transactions are the proper subject of the Commercial Law of Nations. They have a dual nature. They are public in their source of capital, generally, and private in their form of organization. Their main purpose is to effect a combination of public authority and commercial flexibility.²⁷

In many countries, public corporations may receive grants or subsidies from the government, and benefit to some extent from tax immunities and other privileges of government; the tendency, however, is toward the elimination, or at least the reduction, of such special treatment. There is a general trend "toward making the public corporation commercially and legally as similar to private enterprise of a comparable character as

25. Mann, *supra* note 10, at 34.

26. Domke, *Progress in International Commercial Arbitrations*, 1 N.Y.U.J. INT'L L. & POL. 37, 42 (1968).

27. Friedmann, *Some Impacts of Social Organization on International Law*, 50 AM. J. INT'L L. 475, 484 (1956).

possible, except for its responsibility to the public [through the government]."²⁸

Writers, as well as many national courts, have been puzzled by this new phenomenon and are vacillating in attempting to characterize its legal status. Opinions differ on whether the public corporation is an arm of government and therefore shares its legal status, including sovereign immunity, or whether, for the purposes of legal liability, it is a separate legal entity and should be distinguished from the status of a governmental agency.

Prior to 1952, it was the policy of American courts to accord absolute immunity (from suit and execution) to foreign governments and their agents.²⁹ In 1952, however, the State Department, recognizing the increased role of governments in commercial activities, announced in the Tate Letter a new policy with regard to the filing of suggestions of immunity in suits against foreign sovereigns.³⁰ The letter stated:

[T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.³¹

According to the restrictive theory, the Department would file suggestions of immunity if a claim is brought in a United States court from acts of the foreign government of a purely governmental character (*jure imperii*), but would decline to do so in instances where the acts engaged in were of a commercial or proprietary nature (*jure gestionis*).

The Supreme Court has not yet had occasion to apply the restrictive theory of sovereign immunity. The most authoritative judicial attempt to apply it has been *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*.³² In that case, in the absence of any State Department suggestion of immunity, the court held that the Spanish Consul General, having entered into a voyage charter on behalf of the

28. *Id.* at 485.

29. See Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 94 (1953). See also *Wulfson v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 138 N.E. 24 (1923), where the court went so far as to grant immunity to a government not recognized by the United States.

30. Letter from Jack B. Tate to Philip B. Perlman, May 19, 1952, in 26 DEP'T STATE BULL. 984 (1952).

31. *Id.* at 985.

32. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

Spanish agency to transport surplus American wheat from Mobile, Alabama, to various Spanish ports, and having agreed to arbitrate in New York disputes arising under the charter, must be deemed to have consented to the jurisdiction of the U.S. court in an action to compel arbitration. The court found that the act of the Consul General in chartering the vessel was not strictly a public or political act, but was more a private commercial act which did not entitle the Spanish agency to immunity from the court's jurisdiction.

State Department determinations of entitlement to immunity based on the public/private act dichotomy stated in the Tate Letter have not been entirely evenhanded. In *Isbrandtsen Tankers, Inc. v. President of India*,³³ another case involving a shipment of grain, this time under a charter party to which the Government of India was a party, the State Department issued a suggestion of immunity. The court held it was bound by the suggestion and could not entertain jurisdiction. It noted in passing that the *jure imperii/jure gestionis* distinction, which it had taken pains to consider in *Victory Transport*, really had never been adequately defined and was probably unworkable.

It seems clear, on the strength of the decisions in *Victory Transport* and *Isbrandtsen Tankers*, that the State Department will continue to base its suggestions more on the basis of the possible international repercussions of a suit than on any distinction between the private and public acts of a government or its agent. This relatively arbitrary standard can only hinder the flexibility of operation available to the government corporation. Professor Friedmann writes:

Unless we can free ourselves from the fallacy that the undeniably public purposes of corporations, that are to a greater or lesser extent established and controlled by governments, impair their character as autonomous entities designed to be legally separate and distinct in status and structure from the government, much of the usefulness and flexibility of this device of the public corporation—as valuable in international as it is in national municipal law—will be lost.³⁴

If international commerce is to expand through the vehicle of the public government corporation, there is a need to revise existing doctrines pertaining to the corporation, and modify traditional rules of governmental immunity. Both stand in the way of the development of international commercial transactions through this medium.

33. 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1972).

34. Friedmann, *supra* note 27, at 485-86 (footnotes omitted).

II

THE LAW OF INTERNATIONAL TRADE

A. ITS SCOPE AND DEVELOPMENT

The development of the Law of International Trade has made great progress since the end of World War II. One authority has stated:

One of the most remarkable developments on the contemporary legal scene is the emergence of an autonomous law of international trade which, by tolerance of the national sovereigns, is breaking through the barriers of national legal systems and assuming universal character.³⁵

It is widely recognized that such an autonomous body of law, whose terms offer more effective solutions to the problems of international trade, is increasingly replacing the conflict-of-laws approach which may indicate as applicable one of the many national systems of law that may be inadequate in the changed circumstances of modern international trade.³⁶ Two factors have made this development possible. One is the elective character of the law; the other is the growing use of arbitration in trade disputes.³⁷

The elective nature of the Law of International Trade exists because this branch of law is founded on the principle of the autonomy of the parties' wills. Such relative freedom in tailoring contracts enables the parties to overcome the peculiarities of the various municipal systems of law, and to adopt rules more suitable to the requirements of their individual relationship. This new, autonomous law is being expressed in model contracts, standard clauses, general terms of delivery, commercial customs and trade usages.³⁸

Experience has shown, however, that for the autonomous will of the party to a contract to be considered effective, it has to be complemented by an arbitration agreement. Parties willing to develop rules to govern their relationship apart from municipal laws do not wish to find themselves subject to municipal courts when disputes arise. They prefer arbitral tribunals where customs, usages, and business practices are more readily taken into account.

35. Schmitthoff, *The Unification or Harmonization of Law by Means of Standard Contracts and General Conditions*, 17 INT'L & COMP. L.Q. 551, 563 (1968).

36. Goldstajn, *International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 103, 104 (C. Schmitthoff ed. 1964).

37. Goldstajn, *The New Law Merchant*, 1961 J. BUS. L. 12.

38. *Id.*

The Law of International Trade has gone through three stages of development: the medieval *lex mercatoria*; the incorporation of the law merchant into municipal law; and, finally, the modern Law of International Trade.

The *lex mercatoria* had its origins as far back as Babylonia. Through the ages, it passed from one country to another, undergoing changes and modifications in the process. The Romans perfected its rules, and Justinian codified them. It was inherited by the Byzantine Empire and ultimately reached the Italian cities. There it developed into a special law for merchants, and spread throughout Europe and finally to England. Use by mercantile associations and special courts of fairs in the great market places assisted it in obtaining a uniform character. It came to be observed by the members of the merchant class in all parts of the then known world.³⁹

Eventually, the *lex mercatoria* was incorporated into municipal laws of both civil and common law countries. France led the way in the civil law countries with Colbert's codification, culminating in the adoption of the Code de Commerce in 1807. This Code became the pattern for the legislation of many countries. It is still the basis of the codes of Belgium, the Netherlands, Poland, Greece, Spain, and, to a large extent, Italy.⁴⁰

In England, the incorporation of the law merchant started with the limitation or outright abolition of the jurisdiction of the Court of Admiralty, the main repository of the autonomous law merchant, and other special courts, over commercial disputes.^{41,42} The law merchant thus became part of the law of the land, the common law, and, as a consequence, lost its procedural swiftness and summary informality, characteristics well-suited to commercial matters.

In the United States, commercial law developed in a similar manner. It was not a separate body of law for the mercantile class. Legislation regulating business based on English practice was enacted in the colonies. Later, motivated by business conditions, several states established an organization for voluntary cooperation in the preparation of uniform

39. Schmitthoff, *International Business Law: A New Law Merchant*, in 2 CURRENT LAW AND SOCIAL PROBLEMS 129, 131 (R. St. J. Macdonald 1961).

40. Isaacs, *Commercial Law*, 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 17 (1937).

41. G.R.Y. RADCLIFFE & G. CROSS, THE ENGLISH LEGAL SYSTEM 236-42 (2d ed. 1946).

42. Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70, 71 (Schmitthoff ed. 1964).

laws. Subsequently, the Uniform Commercial Code, the cornerstone of American commercial law, was enacted in all but one state.

In spite of the generally substantial differences in the civil and common law orbits, there is a widely prevailing view [Isaacs, Tunc, Mansfield, Pollock] that a certain similarity exists among the trade laws of all nations.⁴³ One commentator has stated:

[It is] a similarity which appears to transcend the division of the world into countries of socialist planning and of free market economy and into legal systems founded on civil law of Roman inspiration and the common law of English origin.⁴⁴

Basically, the similarity seems to be founded on the international nature of trade and the universality of the commercial practices which these laws govern.

As the Law of International Trade develops, it must nevertheless continue to respect the public policy of each State. The laws of a particular State may override or qualify its rules. However, in exercising this pre-emption, a State should seek to insure that the law applicable in any case enables it to best discharge two possibly conflicting social functions.

[O]n the one hand, the duty of the State to protect, by means of coercive rules, the community as a whole against the economic preponderance of the few, and, on the other hand, the elasticity and adaptability required by commercial transactions.⁴⁵

In spite of the fact that the autonomous Law of International Trade can apply in a municipal jurisdiction only by leave and license of the municipal sovereign, nevertheless it attempts to provide its own legal basis independent of and without reference to a municipal system of law.⁴⁶ It is founded on the twin principles of freedom of contract and the recognition of international trade arbitral awards.

The universal recognition and confirmation of the two fundamental principles of freedom of contract and *pacta sunt servanda* is an accepted fact . . . [and] is sufficient to suggest that the ways of giving effect to them should be regarded as technical legal questions . . . [which] should not obscure the essential similarity of approval.⁴⁷

The disposal of disputes in arbitral tribunals instead of the municipal

43. Isaacs, *supra* note 40, at 18; Tunc, *English and Continental Commercial Law*, 1961 J. Bus. L. 234, 237; Schmitthoff, *supra* note 39, at 138; Pollock, *Introduction to W. Bowstead & T. Scrutton*, 13 THE COMMERCIAL LAWS OF THE WORLD at 11 (1926).

44. Schmitthoff, *Introduction to THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* at ix (C. Schmitthoff ed. 1964).

45. Matteuci, *The Unification of Commercial Law*, 1960 J. Bus. L. 137, 139.

46. Goldstajn, *supra* note 37, at 12.

47. *Id.* at 17.

courts further tends to emphasize the relative independence of the Law of International Trade from other branches of municipal law. Nevertheless, several questions may still be left to be governed by the applicable law of the contract. In contracts of sale, for example, questions of the transfer of ownership and the seller's right of retention or stoppage *in transitu* remain subject to municipal law.⁴⁸

Trade law, however, is not entirely dissociated from the general law of the country. Even in those countries which have a separate commercial code, such independence is a matter of historical accident or of legislative technique.⁴⁹ This idea of integration into the national system, while yet maintaining an element of independence, is also expressed in the commentary on the agenda of the London Colloquium:

In every country, independently of its economic system, commercial law is part of the national law; it is based on the general law of the country and it reflects the historical, political, sociological, and economic development of the country in question. But, on the other hand, in no branch of law is the necessity for the adoption of common standards for the management of affairs (standards which can eventually acquire the force of a rule of law) so widely acknowledged as in the domain of international commercial law. In many respects these common standards, as also the common practices and techniques, are similar if not identical in all countries, whether with planned economy or free economy, and yet they can achieve different economic ends.⁵⁰

At least to some extent, the rules formulated by international organizations and associations have also contributed to the development of this new law. However, an objective evaluation of the efforts of these groups reveals several shortcomings. Their membership and authority are limited; they have not achieved worldwide acceptance; and, they are plagued by a lack of sufficient coordination and cooperation.⁵¹

Nevertheless, Professor Schmitthoff points out their importance by stating,

... the law of international trade, by its nature, is universal and for that reason a progressive liaison and cooperation between the formulating international agencies should be the next step in the development of an autonomous law of international trade ...⁵²

48. Lagergren, *The Limits of Party Autonomy—II*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 201, 222 (C. Schmitthoff ed. 1964).

49. Caemerer, *The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE*, 91 (C. Schmitthoff ed. 1964).

50. T. Ionsco & I. Nestor, *The Limits of Party Autonomy—I*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 169 (C. Schmitthoff ed. 1964).

51. 21 U.N. GAOR, Annexes, Agenda Item No. 88, at 22-23, U.N. Doc. A/6396 (1966).

52. Schmitthoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 3, 38 (C. Schmitthoff ed. 1964).

It is the formulating activity of these international agencies which inspires hope for the emergence of a fully autonomous law of international trade.⁵³

He argues that there is a particular value to the rediscovered "international conception of commercial law" because it represents a common platform for the jurists of the East and West.⁵⁴ This opinion is shared by other scholars, among them Piotrowski⁵⁵ and Bystricky.⁵⁶ Therefore, "it is not surprising that the law of international trade is the first branch of private law in which this tendency toward a trans-national law becomes apparent."⁵⁷

B. THE SOURCES OF THE LAW OF INTERNATIONAL TRADE

1. International Legislation

International legislation is an expression of a deliberate normative regulation which is devised internationally and then introduced into the municipal laws by national legislation.⁵⁸ The legislation is created in two ways: first, by States drafting, adopting and ratifying multilateral international conventions in commercial matters; and, second, by the formulation of uniform model laws which States may adopt unilaterally.⁵⁹

International conventions have been a tool for the unification and development of the Law of International Trade for many decades. In general, they may be classified in three categories:

- (1) Conventions providing for rules governing the conflict of laws that might arise in international transactions;
- (2) Conventions decreeing a uniform law for international transactions; and,
- (3) Conventions containing a draft of a uniform law that can be enacted for municipal purposes.⁶⁰

International uniform legislation employs an *a priori* approach. It expresses the will of the national sovereigns, and limits the autonomy of the parties' wills, while taking into consideration not only the interests

53. *Id.* at 37.

54. Schmitthoff, *supra* note 39, at 140.

55. Piotrowski, *The Great Importance of Commercial Law for Peaceful Economic Collaboration of all Nations*, 9 NEW YUGOSLAV LAW 6 (No. 3-4, 1958).

56. Goldstajn, *supra* note 37, at 16.

57. Schmitthoff, *The Law of International Trade and Investments*, 6 DIRITTO NEGLI SCAMBI INTERNAZIONALE 169, 170-71 (1967).

58. Schmitthoff, *supra* note 39, at 150.

59. *Id.*

60. Tunc, *supra* note 43, at 243.

of the parties, but also those of third parties whose economic interests might be affected by the trade transactions. With the increasing importance of international trade between countries of different economic, social, and legal systems, there is a growing demand for the unification of the rules of the Law of International Trade through this type of legislation.

Uniform model laws offer an attractive alternative to international legislation, especially when it "appears that absolute uniformity is not essential, but that a matter of interstate interest would be assisted by providing a working model from which states may draw."⁶¹ The unilateral adoption of uniform model laws may, however, presuppose a certain affinity between the legal systems among which unification is to be achieved. Furthermore, the legislation should be initially proposed by governmental or semi-official agencies, or the model law may be substantially altered to conform it to the municipal legal system.⁶²

Legal opinions differ concerning the value of various forms of international legislation in developing the Law of International Trade. It has been pointed out that the unification of laws through international agreement has the advantage of giving greater certainty.⁶³ States adhering to a convention can rely on it, at least as long as the parties do not repudiate their obligations.⁶⁴ In addition, obligations or rules established by international conventions can be changed only by treaty amendment.

However, the convention approach to an international legislative system has its disadvantages. First, it is rigid, making change difficult and discouraging its subsequent adoption by differing legal systems. Second, national legislatures may create reservations diminishing the uniformity of rules created by it.⁶⁵ Finally, the compromise solution achieved by a convention may not be easily integrated into the municipal legal system.⁶⁶

61. Cf. Pierce, *Uniform Laws in the United States*, in UNIDROIT, YEARBOOK 1956 at 245:

An example is the Model State Administrative Procedure Act, in which it appeared that the adoption of certain principles by the several states was desirable, but that the states had basic differences in economic, social, legal, and political problems which made uniformity impracticable.

62. Matteuci, *The Method of Unification of Law, General Report*, in FIRST MEETING OF THE ORGANIZATIONS CONCERNED WITH THE UNIFICATION OF LAW 36 (Unidroit ed. 1956).

63. *Id.* at 33.

64. *Id.* at 34.

65. *Id.* at 33.

66. *Id.* at 34.

These disadvantages of the convention method have led some experts to believe that model laws, being more elastic, are preferable. Model laws are technically easier to achieve. Lacking the reciprocity of conventions, they can also be changed unilaterally without violating any international obligation.⁶⁷ Moreover, businessmen, who often play a major role in drafting model legislation, are frequently more adept than legislators at finding solutions suitable to the need of international trade. Furthermore, legislative norms established by conventions are incapable of furnishing international trade with a precise legal framework sufficiently detailed to satisfy all the needs created daily by it.

2. *International Trade Custom*

For the purpose of this study, "international trade custom" is interpreted to mean the standard forms of contract and general conditions formulated by various international agencies, such as the International Chamber of Commerce, the United Nations Economic Commission for Europe, the Comité Maritime International, and the International Law Association. Other trade customs which are not so formulated are referred to as trade usages or practices.

In discovering international trade custom, the empirical method is often used. This method is in substantial harmony with the method and technique of the common law. International agencies employ various techniques in this process of formulating existing trade customs. Among them is the use of written forms such as questionnaires that are sent out to trading nations, or the use of "working paper" discussions in which relevant points of law are discussed by experts and representatives of various nations.

a. The Concept of the Standard Contract in the Law of International Trade

The term "standard contract" in the context of international trade custom refers to two types of contracts: model contract forms and contracts of adhesion. The model contract "is a specimen form" used by businessmen "when charged with the duty of drafting a contract which will be altered and adapted to meet the situation in hand."⁶⁸ The con-

67. Graveson, *The Ninth Hague Conference of Private International Law*, 10 INT'L & COMP. L.Q. 18-30 (1961).

68. Schmitthoff, *supra* note 35, at 551.

tract of adhesion, however, is a definitive contract in the form of an unalterable offer; "the party to whom this type of contract is offered may 'take it or leave it' but cannot negotiate its terms and conditions."⁶⁹

The formulation of model contracts on an international basis has been employed in an attempt to give adequate consideration to the interests of all contracting parties to international transactions. Thus, they represent not only an increase of security and an improvement of methods for the removal of disparities between the parties, ". . . but also a search of ways for assuring equality and justice of contract terms which benefits the international community as a whole."⁷⁰ This desire to achieve a balance of economic interest between the negotiating parties explains why modern international trade practice expresses a preference for model contracts.

b. The Autonomy of Parties' Wills and its Limits

The principle of party autonomy is perhaps the most common custom recognized by the Law of International Trade. It implies the freedom of the parties to a contract to describe and arrange its terms according to their discretion. In its classical form, it means that the parties are free to choose the law that will govern their contract; in its more modern form, it means that parties may regulate their contractual relations independent of any municipal law.⁷¹ In this dual form, the principle of party autonomy is recognized by most municipal legal systems. However, disparities exist as to limitations on the principle.⁷²

The liberal concept recognizes the businessmen's legitimate interest in regulating his business transactions in accordance with his peculiar needs. However, the exercise of such rights must be bona fide^{73,74} and cannot be in violation of the public policy of the forum.⁷⁵ The difficulty lies in attempting to strike a balance between these possibly conflicting interests.

The Supreme Court, in its recent decision in *M/S Bremen v. Zapata Off-Shore Co.*,⁷⁶ supported the concept of party autonomy by holding

69. *Id.*

70. Goldstajn, *supra* note 36, at 117.

71. Tallon, *The Law Applied by Arbitration Tribunals—II*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 154, 155 (C. Schmitthoff ed. 1964).

72. Yntema, *Autonomy in Choice of Law*, 1 AM. J. COMP. L. 342, 348 (1952).

73. Schmitthoff, *supra* note 52, at 32.

74. *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A.C. 277, 290.

75. Schmitthoff, *supra* note 52, at 32.

76. *M/S Bremen v. Zapata*, — U.S. —, 40 U.S.L.W. 4672 (U.S. June 12, 1972).

that a forum-selection clause contained in a towing contract between a German and an American corporation was binding on the parties in the absence of any showing that it was unreasonable, unfair, or unjust. The Court noted that forum-selection clauses have traditionally been favored by American courts, and stated that their enforcement ". . . accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world."⁷⁷ Such a decision, by the highest court of one of the leading commercial nations of the world, may indicate a renewed trend in the direction of recognizing increased party autonomy, at least in situations involving enterprises of substantially equal bargaining power.

3. *Decisions of Arbitral Tribunals*

The last of the principal sources of the Law of International Trade are the awards of international arbitral tribunals. Arbitration has made a great contribution to the development of the Law of International Trade, imbuing it with strength and a practical degree of autonomy.⁷⁸ Virtually every commercial contract contains an arbitration clause—an agreement by the parties to submit any disputes arising under the contract to the jurisdiction of an arbitration tribunal. This practice is recognized by both East and West.⁷⁹

Arbitration tribunals are of two kinds: permanent and *ad hoc*. Both types exist in free market economy as well as in planned economy countries, enjoying a universal reputation for impartiality. The best known permanent arbitration tribunals are the Court of Arbitration of the International Chamber of Commerce, the arbitral tribunals of the international trade associations, and the arbitration commissions of the socialist nations. *Ad hoc* arbitration is available whenever neutral arbitration is desired and no permanent tribunal is available, especially in disputes arising out of East-West trade relations.⁸⁰

It may be said that the application of an arbitral process is, in general, an application of the judicial method.⁸¹ Although there exists a greater

77. *Id.* at 4675.

78. Goldstajn, *supra* note 36, at 112.

79. Trammer, *The Law of Foreign Trade in the Legal Systems of the Countries of Planned Economy*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 41, 46 (C. Schmitthoff ed. 1964).

80. Lagergren, *supra* note 48, at 222.

81. Tallon, *supra* note 71 at 155.

freedom and flexibility in arbitration than in litigation, an arbitrator must employ a methodology similar to that of a judge. He must first ascertain the sources of the law that affect the dispute, and then give effect to those sources.

An arbitrator who, *a priori*, is in the same position as a judge, however, feels more free and demonstrates more flexibility in the application and interpretation of judicial precedent. An arbitrator does not usually have arbitral case law to guide him; therefore, he makes greater use of his personal experience as well as trade practices and usages and the circumstances of the specific case.⁸² For example, if the provisions of Article VII of the European Convention on International Commercial Arbitration [of August 21, 1961]⁸³ or any similar provisions apply, the arbitrator is given wide discretionary power and is asked only to "take account of the terms of the contract and trade usages." Similarly, Soviet legal practice, if applicable, may also admit the use of custom, *e.g.*, the Soviet-Swedish Arbitration Agreement of 1940 provides that the Court of Arbitration may apply "customs generally accepted in international trade."⁸⁴ As a result, a different spirit prevails in the process, although it is not one that disregards imperative rules of law.

The problem of the law to be applied in a given case is more difficult for the arbitrator than the judge. Courts apply their domestic rules governing the conflict of laws, but there exists no such *a priori* rules for the arbitrator. It is not the choice of law, but rather the absence of a choice by the parties, which may confront the arbitrator with the problem of finding the intention of the parties.⁸⁵ The rule that the *lex fori* applies is the most accepted in cases in which the parties designate the forum for arbitration, because the selection of a forum generally indicates a willingness to be governed by the forum law. The arbitrator must be guided in his task by the will of the parties if it is expressed.

However, where the parties have failed to designate clearly an applicable law various other choice-of-law rules may come into play. Application of *lex loci contractus*, the law of the place of contracting, is considered by some as the established basic rule. Savigny suggests instead that the law of the place where the contract was to be performed, *lex*

82. *Id.* at 164.

83. 484 U.N.T.S. 364.

84. Ramzaitev, *Private International Law in Soviet Foreign Trade Practice*, 1961 J. Bus. L. 350.

85. Tallon, *supra* note 71, at 159.

loci solutionis, applies. However, these latter two tests, without further qualifications, have proved to be inadequate. The place where a contract is signed or performed is often accidental or insignificant.⁸⁶

Judge Lagergren is of the opinion that there is a new trend toward an individualized choice of law determination as opposed to the mechanical application of conflict rules to all contractual transactions.⁸⁷ This means that the circumstances of every single contract must be examined in order to find the most closely connected law. The arbitrators must find the place where the contract has its center of gravity, and apply that law to it.

In addition to selecting the governing law, it is generally agreed that the parties are free to arrange the arbitral procedure in accordance with their will. However, if it becomes necessary to enforce the award, the victorious party must look to a national court. In a majority of cases, the arbitral award is voluntarily complied with by the parties, but once the mere possibility exists of recourse to judicial enforcement, "arbitration must place itself in relation to a national juridical order and the arbitrator must respect the mandates of the latter."⁸⁸ The procedure must comply with that jurisdiction's public policy and notions of justice.

As a source of law of the Law of International Trade, arbitration is not without its weaknesses. Perhaps its greatest shortcoming is that many of the decisions of arbitral tribunals are not being published. To date, only the awards of the foreign trade arbitration commission of the Soviet Union and the other socialist countries, and the awards of the Japanese Shipping Exchange, have been published.

A weakness as well as a strength of arbitration is its flexibility. Flexibility renders arbitration too uncertain to guarantee the legal security that the international business community seeks. While, on the one hand, it is desirable to keep the institution as flexible as possible; on the other, it is essential to develop its rules and methods in order to offer its users greater legal security and certainty.

Finally, one may inquire with some justification whether arbitration is, in fact, working at cross purposes with efforts to develop uniform international legislation. Since arbitrators rely heavily on trade practices,

86. Lagergren, *supra* note 48, at 207.

87. *Id.* at 207-08.

88. Tallon, *supra* note 71, at 158.

their awards may result in a possible divergency of interpretation being given these practices.⁸⁹

III CONCLUSION

This paper has not been intended as a comprehensive discussion on either the substance or scope of the Law of International Trade nor on the many aspects of private and public law. It is rather an attempt to put the problem of trade law into perspective, to understand what its dimensions are, and where it might go in the future.

There are presently many international commercial transactions which cannot be regulated by either public international law or the rules of private international trade law. It is important to seek to develop an adequate system of law to govern such transactions. However, above all, far greater international effort to codify the law pertaining to international commerce and trade that could be accepted by the great majority of the states is required; an effort currently only in its embryonic stages under the aegis of the United Nations Commission on International Trade Law.

89. *Id.* at 165.

